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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, *Trustee*, and PORT ISABEL AND RIO GRANDE VALLEY RAILWAY COMPANY, *Petitioners*

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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September 14, 1937.

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vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*[2]

REPLY OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The joint and several reply of respondents to the petition for certiorari herein respectfully shows:

1. The petition does not correctly state the issues raised by the original petition for mandamus. The pur-

[1]Petitioner Guy A. Thompson, trustee of the St. Louis, Brownsville and Mexico Railway Company and the Railway Company will be referred to herein as the Missouri Pacific line; petitioner Port Isabel & Rio Grande Valley Railway Company will be referred to as the "Port Isabel line." Collectively they will be called "petitioners."

[2]The Brownsville Navigation District of Cameron County, Texas, will be referred to as the "Port of Brownsville." Respondents Lallier & Philen as "the shippers." Collectively, they will be called "respondents."

ported statement of the allegations, paragraph 2 of the petition (pages 2 and 3), in the form of eviscerated quotations, is utterly inadequate. The summary of the original petition in the majority opinion of the lower court by Circuit Judge Holmes has not been effectively challenged in the petition for certiorari. We shall, therefore, abstain from reviewing the pleadings, and respectfully refer this Court to that opinion for a correct statement of the allegations. (R. 187-193.)

2. The statement on page 4 of the petition (paragraph 5), with reference to the handling of the traffic between Port Brownsville and the interchange with the National Railways of Mexico, is not complete and does not fully describe the situation before the Court. The statement in question follows:

> "In consequence, any shipment moving between the Port of Brownsville and Matamoros, or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel, 2.49 miles over the trustees rails, and 1.24 miles over the Bridge Company's rails; thence over the rails of the Mexican National lines."

The facts are, as alleged in the bill of complaint:

> "Respondent Missouri Pacific owns and controls, or jointly with other parties unknown to these petitioners, owns and controls an international bridge for the handling of traffic between Brownsville, Cameron County, Texas, and Matamoros, in the State of Tamaulipas, Mexico. Said City of Brownsville in Cameron County, Texas, and Matamoros in the State of Tamaulipas, Mexico, are situated adjoining each other except that they are separated by the international boundary line located in the

center of the Rio Grande river. In the center of said international bridge, respondent Missouri Pacific lines, connects with the rail lines of Mexico serving the community of Matamoros." (R. 9.)

The proof on hearing will show that the Missouri Pacific Railway performs the transportation service and effects delivery and makes interchange with the National Railways of Mexico through the joint use of this bridge. The tariffs on file with the Interstate Commerce Commission specifically cover the charges for this service. The tariff of the Missouri Pacific Railway applies "on all carload freight except as otherwise shown to or from points in Mexico." (R. 132.) The tariff of the bridge company is on file with the Interstate Commerce Commission and covers the charges for the use of the bridge in effecting said interchange. (R. 135-136.) The service demanded by respondents is the transportation between the Port of Brownsville and the interchange point where the Missouri Pacific contacts the National Railways of Mexico. As stated above, the tariff on file with the Interstate Commerce Commission specifically covers that service. While it is true that rails of the National Railways of Mexico must, as a practical matter, be used by the Missouri Pacific in effecting interchange with the National Railways of Mexico, it is nevertheless the fact, as shown by the record, that the Bridge Company has rates on file with the Commission covering that service and that it is a joint undertaking of the Missouri Pacific Railway as alleged in the bill of complaint. (R. 9.)

The statement on page 5 (paragraph 5), that the transportation of the commodities in question involves the separately established charges of the Mexican National lines, is in error for the reason that the published tariffs filed with the Interstate Commerce Commission by the Port Isabel Railway (R. 125), the Missouri Pacific lines (R. 132), and the Brownsville and Matamoros Bridge Company (R. 135-136) cover all the service that is being demanded by respondents, that being the identical service that the Missouri Pacific is actually performing for traffic moving through the gateway of Brownsville for all destinations other than the Port of Brownsville.

3. The statement in paragraph 6 of the petition (page 5) that

> "* * * respondents seek a writ of mandamus commanding petitioners to move traffic between Matamoros and the Port of Brownsville and to furnish equipment and facilities therefor."

Does not give a full understanding of the matter involved. As stated above, respondents seek only the transportation provided for in the filed tariffs of the Port Isabel line, the Missouri Pacific Railway, and the Matamoros and Brownsville Bridge Company.

The statement on page 5 that there is no allegation that the trustee has refused to transport respondents' traffic is in error. The following allegation appears in the original petition:

> "Petitioners have made reasonable and seasonable demand upon respondents to transport the commodi-

> ties here involved. Respondents have published rates which they have voluntarily offered to the public as reasonable rates for its transportation and *have refused to permit traffic moving through the Port of Brownsville to be transported at those rates and have refused to furnish facilities and equipment for its transportation.*" (R. 12.) (Italics not in original.)

The commodities involved are described at record pages 15 and 16.

It is alleged that certain traffic was tendered and that its transportation was refused. The car numbers with respect to the traffic are given in the record and the specific refusal of the Missouri Pacific to receive and transport the commodities is there shown. (R. 18, 19, 20.)

The statement on page 5 that

> "No traffic has been tendered to the trustee for transportation by the respondents either at the Port of Brownsville or at Matamoros because the trustee only operates an intermediate line, and has no railroad which directly serves Matamoros or the Port of Brownsville."

is inaccurate and erroneous. The facts are, as alleged (R. 9), that in connection with traffic coming out of old Mexico, the Missouri Pacific operates jointly with the National Railways of Mexico the international bridge where the traffic is interchanged between the two lines. At that point traffic has been tendered to the Missouri Pacific as joint operator of the bridge company. (R. 12.) The allegations in the original petition for mandamus show that traffic was loaded at the Port of Brownsville and ready to be tendered to the Missouri Pacific but

that, upon specific advice from the Missouri Pacific that it would not receive such traffic and transport it, the traffic was not accepted by petitioner Port Isabel and Rio Grande Valley Railway. (R. 18, 19, 20.) It is therefore incorrect to state that traffic has not been tendered to petitioner Missouri Pacific lines.

4. The statement in paragraph 7 of the petition (page 6) that this case is not concerned with the construction of a tariff is incorrect. The case involves nothing other than the duty of petitioners to perform transportation, as defined in the Interstate Commerce Act, under rates published and on file with the Interstate Commerce Commission.

5. The opinion of the Circuit Court of Appeals is not as stated, paragraph 8 of the petition (page 6), in conflict with applicable decisions of this Court, because the matter involved does not require the exercise of the administrative jurisdiction of the Interstate Commerce Commission.

All other statements in the petition, pages 1 to 6 inclusive, not referred to above are admitted to be correct.

WHEREFORE, respondents, jointly and severally, pray that in the exercise of its discretion, this court deny the petition for the writ of certiorari to review the decision of the Circuit Court of Appeals herein.

Respectfully submitted,

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Attorney for Respondents,
Brownsville Navigation District
of Cameron County, Texas.
F. A. Lallier, J. G. Philen, Jr.

REPLY TO PETITIONERS ARGUMENT AND BRIEF IN SUPPORT OF RESPONDENTS' REQUEST THAT A WRIT OF CERTIORARI BE DENIED

(a) *As to the Grounds of Jurisdiction*

The authority for the jurisdiction of this court is correctly stated by petitioners on page 7 but we do not concur in their statement that the case of *DiGiovanni v. Camden Fire Insurance Company*, 295 U. S. 728, represents a set of circumstances similar to those involved in the instant proceeding.

That case involved a question whether jurisdiction could be conferred on the Federal District Court by combining the separately assumed amounts of two insurance policies, one covering property of the husband and the other the property of the wife. No such question is here presented.

(b) The Statement of the Case is Both Incomplete and Incorrect

Petitioners' statement of the case (pages 8-9) is an incomplete, inaccurate, and argumentative discussion which is totally inadequate to give an understanding of the issues involved. We refer again to the majority opinion of the lower court (R. 187-193) for a correct statement of the issues presented.

Certain statements of petitioners, however, require particular attention:

1. On page 8 of the petition the statement is made that the Port Isabel Railway

> "* * * now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation application for a loan to enable it to buy some freight equipment, but the respondents have objected and are objecting to all of the proposed loan."

The matter seems irrelevant to the issues in this case. However that may be, the record shows that the application on file with the Interstate Commerce Commission and the Reconstruction Finance Corporation does not relate in an way to the purchase of equipment. The loan was requested for the purpose of constructing a wholly unnecessary new line of railway designed to divert traffic from the Port of Brownsville and for the purpose of paying certain indebtedness of the Port Isabel line. (R. 148-149.) It is not a fact that the Port of Brownsville has opposed a loan for the purpose of purchasing equipment. (R. 148-149.)

2. On page 8 of the petition it is stated:

> "In the opposite direction on traffic to the Port of Brownsville originating at Matamoros, the initial carrier must be the Mexican lines, which refuses to permit its equipment to come into this country."

The statement obscures the issues. All that respondents are seeking in this proceeding is to have petitioners comply with their tariff provisions reproduced in the

record (132), specifically applying on traffic "to or from points in Mexico." Necessarily this provision comprehends the interchange of traffic with the National Railways of Mexico. Respondents seek only the enforcement of the provisions of this tariff. Respondents do not seek to have any provisions of the Mexican tariffs enforced or any equipment of the Mexican railways moved into this country. The record definitely shows, as stated by the lower court, that the equipment of the American Railways is freely interchanged with the National Railways of Mexico for the purpose of handling traffic to and from the Republic of Mexico. (R. 11, 14, 147-148, 170-171.) These interchange arrangements are the subject of a joint publication on file with the Interstate Commerce Commission covering the car hire and interchange of cars. (R. 148, 170-171.) The petitioners, Missouri Pacific and Port Isabel line, perform joint through line transportation between the Port of Brownsville and the interchange with the National Railways of Mexico. In connection with this traffic, the Missouri Pacific is necessarily, insofar as the tariff provisions in this case are concerned, the orginating and delivering carrier. It is incorrect to say that the Mexican line is the initial carrier. It is incorrect to state that the Missouri Pacific has no interest or concern in the movement except the performance of a switching service. It is a part of the through route. There are through rates. They are the separately published factors, but they are necessarily through rates to cover joint through transportation service.

3. On page 9 of the petition the statement is made that:

> "The problem, therefore, is essentially administrative. No rule or other provision of any tariff was offered in evidence for construction by the court as to meaning or application."

The statement is in error. The tariff provisions require no interpretation. They are clear and unambiguous. They provide for the transportation between points in the United States of commodities moving to and from Mexico. The petitioner Missouri Pacific has, by its tariff publications, held itself out to perform that transportation service on traffic to and from Mexico to the interchange with the Port Isabel line in Brownsville. (R. 132.) Respondents seek only the performance of that transportation duty.

4. The statement is made on page 9 of the petition that:

> "The majority opinion erroneously stated that Lallier and Philen tendered freight to the appellees who failed to transport it."

The statement is erroneous. We have previously quoted herein the allegations that petitioners had reasonably and seasonably demanded that respondents transport the commodities here involved. (R. 12.) The commodities involved are described at record page 15. It is alleged that respondents have refused to permit traffic moving through the Port of Brownsville to be transported at those rates and have refused to furnish facilities and equipment for its transportation. (R. 12.) Specific in-

stances of that refusal are shown in the bill of complaint, record pages 18, 19 and 20.

5. The petition states, at page 9, that the majority opinion in the lower court is in error in stating that "there is no request or necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil." We insist that the lower court was correct. We seek only to have the delivery made to the interchange with the National Railways of Mexico. The Missouri Pacific Railway may make that interchange in the center of the international bridge if it so desires. Respondents seek an order from the court commanding the petitioners to perform the transportation in accordance with their published tariffs and nothing else.

6. The statement on page 9 of the petition that the record shows no tariff, rule, or statement that cars will be furnished for the transportation of the commodities involved is wholy beside the point. No tariff publication in connection with any rate makes the explicit statement that cars will be furnished. The Interstate Commerce Act provides in Section 1, paragraph 3, that the term "transportation, as used in this act, shall include locomotives, cars, and other vehicles, etc." The publication of a rate for the transportation, includes by the terms of the Act itself, the provision for the cars essential to the transportation service for which the rates were published. The tariffs under which the transportation service here sought to be performed are in the record, pages 125 to 136.

(c) *Answer to Petitioners' Argument*

Petitioners contend that there is no published rule requiring them to furnish cars in order that transportation service might be performed under the published tariffs. The existence of the published tariffs is not denied. They contend that, because the tariff does not state specifically that the railway companies will furnish cars, the matter involved is an administrative question which should be submitted to the Interstate Commerce Commission. Their contention may be stated as follows:

> "It is necessary, in addition to having a published tariff, to have a published rule stating that cars will be furnished for the purpose of transporting commodities at the published rate."

The matter here presented is not one within the jurisdiction of the Interstate Commerce Commission. *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208; *C. S. Wells & Son v. Chicago, Burlington & Quincy Railroad*, 161, I. C. C. 145, 149; *In the Matter of Private Cars*, 50 I. C. C. 652, 671. The Interstate Commerce Commission, following the decision of this court in *United States v. Pennsylvania, supra*, has held that it is without jurisdiction to issue an order requiring the rail carriers to furnish equipment for the performance of their transportation duty as defined in Section 1, paragraph 4 of the Interstate Commerce Act.

The matter of discrimination growing out of the state of facts here involved as between the Port of Brownsville and other Gulf ports, has been presented to the Inter-

state Commerce Commission and is now pending before that Commision in *Docket 27691, Brownsville Navigation District of Cameron County, Texas, et al v. The St. Louis, Brownsville and Mexico Railway Company, et al.*

The contention of petitioners at once raises the question whether the carriers subject to the Interstate Commerce Act may, in each instance where a carload of freight is tendered to them, refuse to furnish cars for its transportation at the published rates. Petitioners, it seems would contend that, in each such instance, an application must be made to the Interstate Commerce Commission for an administrative order requiring the carriers to furnish a car so that the transportation service might be performed at published rates. After a shipper has obtained such an administrative order, he would still be required to go to court to enforce it before the transportation service can be obtained. The provisions of the Act clearly negative such a contention.

Section 1, paragraph 3, Title 49, Chapter 1, U. S. C. A., defines the term "transportation" as follows:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This Court, in interpreting that paragraph of Section 1, has held that it is complete and all inclusive and that it supersedes all state regulations with respect to the furnishing of cars and equipment. See *Southern Railway Company v. D. L. Reid*, 222 U. S. 424, 32 S. Ct. 140; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Edward Dettlebach*, 239 U. S. 588, 36 S. C. 177. The state courts in this territory have followed these decisions and made like findings. See *Atchison, Topeka & Santa Fe Ry. v. Smyth*, 189 S. W. 70; *Ft. Worth & Denver City Ry. Co. v. Strickland*, 208 S. W. 410; *Cecil v. Southern Express*, 229 S. W. 1041.

Section 1, paragraph 4, Chapter 1, Title 49, U. S. C. A., provides:

> "It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, etc."

The sole question in this case, as stated by the lower court, is whether or not there are published tariffs covering the service demanded by respondents. The published tariffs of the Missouri Pacific lines specifically state that it is applicable on traffic "to and from points in Mexico." The tariff applies between the interchange of the Missouri Pacific lines with the Brownsville & Matamoros Bridge Company and the interchange with connecting lines in Brownsvile. The Port Isabel Railway is "a connecting line in Brownsville." Therefore, on traffic to and from Mexico, the Missouri Pacific has a pub-

lished rate from its interchange with the Brownsville & Matamoros Bridge Company and the interchange with the petitioner Port Isabel line ranging from $3.15 to $4.05 per car. (R. 132.) The Port Isabel line has a published tariff on file with the Interstate Commerce Commission stating that:

> "A charge of $8.10 per car will be assessed from interchange connections with the St. Louis, Brownsville and Mexico at Brownsville, Texas, to and from points on the Brownsville Navigation District tracks on all classes and commodities originating at or destined to points in Mexico." (R. 126.)

The Brownsville & Matamoros Bridge Company has a tariff on file with the Interstate Commerce Commission naming the charges by classes 1 to 12. These are assessed for the use of the international bridge. As alleged in the bill of complaint, the international bridge is a joint operation of the Missouri Pacific and the National Railways of Mexico. (R. 9-11.)

While the pleadings and evidence do not deal with the question of how the bridge is operated, the evidence or hearing will show that it is a vehicular as well as a pedestrian bridge and is used also by the railroads for interchange of traffic. As a legal matter necessarily interchange is effected at the international boundary line. As a practical matter so that the bridge may not be blocked with railroad cars and its use as a vehicular bridge destroyed, the Missouri Pacific Railway performs the transportation service from Brownsville over the bridge into the yards of the National Railways of Mex-

ico in Matamoros, Tamaulipas, Mexico. Technically, however, respondents can only seek and demand of petitioner Missouri Pacific the performance of the transportation service to the interchange with the National Railways of Mexico. We seek nothing else. That interchange is provided for in published tariffs lawfully on file with the Commission. (R. 147-148.)

The real difficulty, as stated by the court below, grows out of the desire of petitioner Missouri Pacific to divert the traffic from the Port of Brownsville to other ports served by its rails so that it might thereby enjoy a longer haul on the traffic. In order to accomplish this end, the petitioner Missouri Pacific line has taken advantage of the fact that the petitioner, Port Isabel line, is one of the many short line railways of the nation that owns no equipment but obtains its supply from the trunk lines under rules and regulations prescribed by the Interstate Commerce Commission and approved by this court. See *Rules for Car Hire Settlement, 160 I. C. C. 369, 165 I. C. C. 495*, and *Chicago, Rock Island & Pacific Railway Co. v. United States*, 284 U. S. 80, 52 S. Ct. 87. In the last case this Court at page 95 stated:

> "The trunk lines, as owners, furnish in the main all the car equipment used by the short lines."

Mr. L. S. Bourne, General Manager of petitioner Port Isabel line since 1925 (R. 166) stated:

> "The Rio Grande has operated under those rules for the interchange of loaded cars and empty cars with the Missouri Pacific and the Southern Pacific since my tenure of office as general manager of the

> Rio Grande. The car service rules of the American Railway Association provide remuneration for the use of cars owned by one carrier and operated and used by another carrier. The remuneration is known in the railway industry as per diem. It is customarily a charge of $1.00 per day for the use of equipment while in the use of a railroad not owning the car. The Rio Grande has at all times, where it has made use of equipment furnished it by the Missouri Pacific and the Southern Pacific complied with these American Railway Association Car Service Rules, and it has paid the per diem to the Missouri Pacific and the Southern Pacific as required by the terms and conditions of those rules. We have never refused to abide by the rules or paid the charges therein prescribed." * * *
>
> "We are ready and willing to transport loaded cars from the turning basin to the interchange at Brownsville under the published switching tariff published by us as a result of the agreement with the Southern Pacific and Missouri Pacific hereinabove referred to."
>
> * * * "We have only discontinued so transporting the cars after said carriers refused to furnish the equipment or refused to receive from us cars loaded at the turning basin." (R. 168-169.)

In reviewing the rules prescribed by the Commission, which are now published and on file with the Commission, this Court in the case last cited, stated:

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of equipment. If they do not own cars, they must rent them. The Commission itself has pointed out very clearly the basis for this requirement." 284 U. S. at 97.

The Commission itself, as stated by the Court, had prescribed the rules under which the short lines might

rent equipment from the trunk lines who own and control the supply. The rules under review by the Supreme Court in that case dealt particularly with this question. In that connection the Court made this further statement:

> "Moreover, the car equipment of the country is substantially in the hands of the trunk lines, that owned by the short lines being almost a negligible proportion of the whole. And this fact affords some additional grounds for the classification. Indeed the classification was recognized as legitimate by appellants themselves. When they subscribe to the provisions that short lines should be permitted to become associate members only of the American Railway Association but without voting rights." 284 U. S. at 93-94.

This Court was there discussing the car service rules of the American Railway Association specifically referred to by Witness Bourne. These rules are on file with the Commission in a tariff specifically listing the Port Isabel line as a participating carrier. (R. 148.)

The Port of Brownsville, as stated by the lower court, is a new port, opened to the public May 16, 1936. Shortly thereafter, when the commerce began to move through Brownsville to and from the Republic of Mexico, the Missouri Pacific, by reason of the fact that it was losing the business at other ports, refused to transport the commodities to and from the interchange with the National Railways of Mexico and the interchange with petitioner, Port Isabel Railway. (R. 17.)

On October 7th, Missouri Pacific car 83054 was loaded at the Port of Brownsville with sheet steel for transpor-

tation to Monterrey in the Republic of Mexico. This car had reached the lines of the Port Isabel Railway under load and after it was unloaded the shipper at the port of Brownsville had reloaded it for transportation under the published rates to the interchange with the National Railways of Mexico through the gateway of Brownsville. The petitioner, Port Isabel line, refused to receive the car because it had been informed by the Missouri Pacific that the latter would not receive it at Brownsville and transport it. (R. 18-19.) The allegations are that this traffic was tendered to the carriers with an expression from the shippers of their willingness and readiness to pay the lawful charges as published and on file with the Commission. (R. 22-23.)

Another instance is contained in the evidence of Witness Hofmokel. Certain steel billets were booked by the shippers for transportation to the Port of Brownsville, thence by railroad to Monterrey, Mexico. By reason of the refusal of the Missouri Pacific to permit the petitioner, Port Isabel line, to load equipment on its rails, by reason of the refusal of the Missouri Pacific to receive the loaded cars when tendered, and by reason of their refusal to transport from the interchange of the Port Isabel line to the interchange with the National Railways of Mexico, the steel billets were diverted to Corpus Christi. There, American railway cars were used for the loading of the traffic from the vessels onto the cars. These cars were transported by the Texas Mexican Railway from Corpus Christi to Laredo, there the cars were

delivered to the National Railways of Mexico and transported loaded into Monterrey, State of Nuevo Leon, Republic of Mexico. These same cars or similar cars would have been used at Brownsville for the same transportation, the only difference being that the Missouri Pacific at Brownsville would have transported the cars to the interchange with the National Railways of Mexico, whereas from Corpus Christi they were transported by the Texas Mexican Railway. When these loaded cars reached Monterrey, they were made empty and loaded northbound with return commerce moving through the American ports to European and American destinations. The Missouri Pacific had informed the shippers in Mexico that, if routed by the Port of Brownsville, they would not be transported at Brownsville at the published rate hereinabove referred to. (R. 144-145.) The commerce in question would have required no more cars, and in fact not as many, if transported through the Port of Brownsville than it did require for the transportation through the Port of Corpus Christi. The same use of the American cars under the same rules and regulations is sought at Brownsville as is being accorded to other ports.

It is therefore clear that three propositions were submitted to the District Court. First, the issuance of a mandamus compelling the carriers to transport the cars that were loaded on the lines of the Port Isabel & Rio Grande Valley Railway. Obviously, these cars reached the Port Isabel line under the existing car service rules. They were loaded in accordance with the practices under those

rules. They were tendered to the carriers with the request that they be transported at published rates. This transportation was refused. An administrative order with respect to this matter would be nothing other than an order stating that the carriers should move the traffic. It could only be enforced by the courts.

Second, traffic reached the Port of Brownsville requiring cars for its transportation. The Port Isabel line, owning no equipment, was denied an opportunity to rent that equipment under the car service rules published and on file with the Commission and approved by this Court.

Third, loaded and empty cars are sent into Mexico for the transportation of commodities into and through American ports. These cars reach the National Railways of Mexico under the interchange regulations on file with the Commission, but petitioner, Missouri Pacific, will not transport them to the Port of Brownsville loaded with commerce for transshipment through that port.

The jurisdiction of the lower court to issue the mandamus sought to enforce the carriers duty to transport at published rates arises under Section 49, Title 49, Chapter 2. U. S. C. A. That section provides as follows:

> "The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier, of any of the provisions of the preceding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or

upon terms of conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceding chapter."

In interpreting that section of the Act this Court has recognized two classes of cases, one in which preliminary resort must be had to the Interstate Commerce Commission for the exercise of its administrative function; the other in which no such preliminary resort to the Commission is necessary. The first is a class of cases in which it is sought to change or alter existing rules, rates, and regulations on file with the Commission. The second is a class of cases in which no attack is made on existing rules or tariff provisions, but where the purpose is merely to seek the enforcement of the carriers duty to transport at published rates and to comply with the statutes and the lawfully published tariffs. Such a case, it is held, may be brought in the district court in the first instance.

No case has been cited by petitioners in which it has been held that it is necessary to resort to the preliminary administrative jurisdiction of the Interstate Commerce Commission in order to enforce the carriers duty to transport at published rates.

The first case cited by petitioners is that of the *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477. The facts are fully stated by the Court as follows:

> "This action was brought by the Merchants' Elevator Company in a state court in Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the state by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew, or should have known that fact. Immediately after inspection, disposition orders were given, and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:
>
> " 'Diversion of reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original desti-

nation, but before placement for unloading, * * * a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.' "

"The shipper contended that the case was within the exception known as exception (a), as amended by supplement 1, which provided that rules (including Rule 10) shall not apply to '(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars or track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.'

"Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517, claimed reasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction." 259 U. S. at 288.

Distinguishing the *American Tie & Timber Co.* case and the *Loomis* case, the Court said:

"In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to be determined by the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." 259 U. S. at 294.

In a like manner, the only question presented in the case at bar is whether there is a duty resting upon petitioners to transport the commodities tendered by respondents. The question is determined by an examination of the provisions of the Act and of the published tariffs. No contention is made that the applicable tariff provisions contain language used in a technical sense, the construction of which requires the expertness of an administrative body. No contention is made that any words of the applicable tariff provisions are used in any sense other than their ordinary meaning. The case fits perfectly into the excellent statement of the rule in Vol. 2 of Sharfman, The Interstate Commerce Commission, at 401:

> "Thus, for example, the principle of primary jurisdiction has been held to be inapplicable in cases involving construction of tariffs, departure from published rates, unequal enforcement of car-distribution rules. In these circumstances the only task was to apply the law to uncontroverted facts. In construing the words of carrier tariffs used in their ordinary meaning, independently of external conditions, and in awarding damages for departures from published rates and for discriminatory enforcement of established car-distribution rules, practices definitely prohibited by statute, the courts were but asserting a jurisdiction expressly reserved to them. The reasons for requiring preliminary resort to the Commission, in conformity with the nature and purposes of the regulatory structure as a whole, were not operative under these conditions, because no issues of fact, evidentiary or ultimate, were involved, and there was neither need nor occasion for the exercise of administrative discretion."

The next case cited by petitioners is that of *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292. (This case is cited by petitioners as *Baltimore & Ohio Railroad Co. v. U. S.*, 215 U. S. 480.) That case involved litigation to modify or change for the benefit of the Pitcairn Coal Company the existing established and published rules covering the distribution of coal cars in time of car shortage. It therefore involved paragraphs 12 and 15 of Section 1 of the Interstate Commerce Act and not paragraphs 3 and 4. In disposing of that case this Court stated:

> "To decide the merits of this case will require us to determine the legality of the regulations of the B. & O. Railroad Company by which that company distributed cars to coal mines along the line of its road in case of car shortage." 215 U. S. at 482.

It was admitted in the *Pitcairn* case that the coal mine received all the cars to which it was entitled under the established regulations of the B. & O. Railroad Company, and it is shown in the opinion (215 U. S. at 495) that the Commission had expressly approved the B. & O. regulations that were under attack. The *Pitcairn* case did not involve the enforcement of an existing regulation or rate but an effort to modify existing car service rules.

Morrisdale Coal Co. v. Pennsylvania Railroad Co., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1394, involved the reasonableness of existing published car service rules, filed with the Interstate Commerce Commission in compliance with the provisions of paragraph 12, section 1, of the Interstate Commerce Act relating to the distribu-

tion of coal cars. The coal company sought to modify the rules and regulations so that privately owned equipment would be counted in the proration of available cars. Necessarily a proceeding of that character involved an administrative question that should be submitted to the Commission.

In *Pennsylvania Railroad Co. v. Clark Bros. Coal Mine Co.*, 239 U. S. 456, 35 S. Ct. 896, 59 L. Ed. 1406, Clark Brothers had filed a complaint with the Commission seeking reparation as damages for alleged discrimination in the distribution of coal cars. Complainant was seeking, not the enforcement of existing rules, but a modification of those rules. Prior to the decision by the Commission, Clark Brothers filed a suit in the state court seeking damages for the same acts. Before the trial in the court, the Interstate Commerce Commission rendered its decision. Clark Brothers, dissatisfied with the result of that decision, sought to pursue the case in the state court. The Commission found that the rules were discriminatory and that plaintiff had been damaged in the amount of $31,127.96. The state court awarded damages with reference to the same acts and the same period in the amount of $124,443. This court held that the express requirement of an election between the proceeding before the Commission and a suit in the Federal Court left no room for the conclusion that there is an option in such case to resort to the state court. The case obviously has no application here.

Mitchell Coal & Coke Company v. Pennsylvania Railroad Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472, involved the reasonableness of an allowance to shippers of coal for the performance of a substitute transportation service in the switching over the spur tracks of the industry. The Mitchell Coal Company did not receive an allowance for the switching service but the railroad itself performed the switching to and from its mine. The Altoona and other mine companies switched the cars from their mines to the station of the railroad company and received an allowance of 10 cents per ton for the performance of that service. The Mitchel Coal Company contended that the 10 cents per ton was excessive and amounted to a rebate, and also was discriminatory in that the railroad company refused to permit the Mitchell Coal Co. to perform its own switching service and receive an allowance for it. This court pointed out that the case involved first, the reasonableness of the allowance to the Altoona and the other mines and, second, the question of discrimination as between the Altoona and the Mitchell mines. At 230 U. S. 264 this Court stated:

> "For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station."

The order sought by the coal company in that case would have required the court to find whether or not the allowance of 10 cents was a reasonable allowance for the

service performed and if not to have fixed a reasonable allowance for the performance of that service. It would also have required the court to have found whether or not failure to make an allowance to the Mitchell Company constituted an unreasonable discrimination and preferential practice under the Act. The case at bar is quite different. We seek only the performance of the transportation duty as defined in the Act at the lawfully published charges on file with the Commission.

Loomis v. Lehigh Valley Railway Co., 240 U. S. 43, 36 S. Ct. 228, originated in an effort to have the railroads furnish grain doors and bulkheads in cars used in the transportation of farm products in bulk. The rate schedules covering the products made no reference to allowances for grain doors or bulkheads. The question presented was whether the court could so modify the existing rules and regulations as to require the carriers to furnish grain doors and bulkheads. In 240 U. S. 43 this Court stated (page 48):

> "No serious dispute exists concerning the facts. The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration."

The Court points out that the Interstate Commerce Commission had expressly ruled that the carriers could not lawfully, at their own expense, furnish grain doors

and bulkheads, or reimburse shippers for doing so, unless the tariff so provided. It is thus clear that the case involved an effort to have the court legislate with respect to freight rate matters, *i. e.*, to modify published tariffs lawfully on file with the Commission. No such proposition is here involved.

In *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, the plaintiff sought reparation on the alleged ground that the railroad company had exacted unreasonable rates for the transportation of cottonseed from Louisiana to Abilene, Texas. The rates were published and on file with the Commission. The published rates were exacted and charged in accordance with the tariff. The transportation service was performed in accordance with the provisions of the Act and the published rates applied.

Such are the six cases cited and discussed by petitioners in support of their application for *certiorari*. These respondents could scarcely have found cases better adapted to demonstrate the inapplicability to the case at bar of the doctrine of preliminary resort to the Commission.

At page 23 of the argument in support of the petition, petitioners challenge the statement of the lower court that no car shortage or emergency existed in the case at bar which renders the carriers unable to comply with a writ of mandamus. Petitioners do not assert that any such car shortage or emergency does exist nor do they point to allegations in their pleadings to that effect.

The argument seems rather to be that the possibility of a car shortage at some time in the remote future negatives the power expressly given to the district court by Section 49 of the Act, heretofore quoted, to issue the writ of mandamus, commanding such common carrier to move and transport the traffic, or to furnish cars of other facilities for transportation. The contention, if approved by this Court, would, of course, completely emasculate the power of the District Court under this section of the Act to compel compliance by any carrier with the common law duty to serve, whatever the circumstances or the reason for the refusal. The contention has been answered, if any answer is needed, by this Court in *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188:

> "It is only in times of car shortage resulting from unusual demands where other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carriers can be regarded as qualifying or affecting the right of the shippers to demand and receive cars, commensurate in number with their need."

The objection that the issuance of the writ would preclude administrative action by the Commission in the event of an actual car shortage in the future is too idle to be considered.

To justify the statement of the lower court, it is only necessary to review the incident of the steel billets. (R. 144.) That shipment was booked to move through the Port of Brownsville. The shipper at Brownsville was

forced to divert it to Corpus Christi because of the refusal of respondents to transport at published rates. At Corpus Christi it was loaded in American railway cars, transported to Laredo, Texas, and there delivered in the American railway cars to the National Railways of Mexico and transported by that carrier to Monterrey, Mexico. Obviously the use of the cars for the transportation through the Port of Brownsville would have created no more car shortage or emergency than was created in connection with the transportation of that identical commodity through the Port of Corpus Christi.

The Port of Brownsville is a new port, opened to commerce May 16, 1936. It has not demanded of the carriers any unusual or abnormal use of American railway equipment. The commodities for which it competes and for which its shippers compete are those that are normally moving to and from the Republic of Mexico. They have been moving and are now moving through other gateways and other ports, and Brownsville is being denied an equal opportunity to participate in the commerce by petitioners' refusal to perform transportation at published rates and to furnish equipment for the performance of that transportation.

At page 23 of the argument the statement is made that a writ of mandamus commanding the Port Isabel to furnish cars would be vain because it owns none, and for that reason, it is asserted, the matter involves a technical question that should be submitted to the Interstate Commerce Commission. Petitioners do not call to

the attention of this Court anything that the Interstate Commerce Commission would have to do in the premises that it has not already done in the car service case which was reviewed by this court. See *Rules for Car Hire Settlement*, 160 I. C. C. 369, 165 I. C. C. 495. There the Commission had under review the rules of the American Car Service Bureau concerning the rental of equipment by short line railways that owned no equipment.

In reviewing the matter in *Chicago, Rock Island & Pacific Railway v. U. S.* 284 U. S. 80, 52 S. Ct. 87, this Court stated:

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of equipment. If they do not own cars they must rent them." 284 U. S. at 97.

In the same volume at page 95 this Court stated:

> "The trunk lines as owners furnish in the main all the car equipment used by the short lines."

The *per diem* rules and rates were prescribed by the Commission in amounts designed to produce a reasonable return on the investment. In the car service case at page 378 the Commission stated:

> "The per diem rate is supposed to reflect the average cost, to the owner, of freight car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacement, miscellaneous expenses and six per cent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership maintenance average 83.812c per car day and $305.91 per car unit in the calendar year 1925, and approximately $1.00 per car a day in that year for the period cars were actually in service."

The Commission and this Court have thus reviewed the rules and regulations under which petitioner, Port Isabel line, obtains its equipment. The general manager of the Port Isabel line testified that his line had always operated under these rules and that they were receiving equipment from the respondent Missouri Pacific and other carriers under these rules at the present time. (R. 167-168.) We quote from that testimony:

> "The refusal of the Missouri Pacific and the Southern Pacific related only to the traffic coming to and from Mexico. As to all other traffic, they have continued to furnish us equipment, and we have continued to transport it under the car service rules of the American Association of Railways hereinabove referred to." (R. 169.)

Petitioners assert, at page 24 of their argument, that the effect of a passage in the opinion of the lower court is to require petitioners to establish through routes between points in the United States and points in Mexico. There is nothing in the quoted passage which can possibly be so construed. It refers to "a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico." Compliance with rates between points in the United States consistent with *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, is all that we have sought, and those rates have long been published and filed with the Commission. Through rates are not essential to the transportation of the commerce which we seek to move.

A statement of petitioners, at page 24 of their argument, seeks to inject into the case some question of pro-

ration of equipment as between petitioner Missouri Pacific lines and petitioner Port Isabel line. It is true as stated in the cases there cited by petitioners that the furnishing of equipment for through transportation is a joint obligation of all carriers participating in the through movement. Here, however, we are concerned with two carriers participating in the through movement. One is necessarily under the joint obligation and owns no equipment. The other is equally subject to such joint obligation and owns and controls all of the equipment. The petitioner owning no equipment has heretofore and is now operating under car service *per diem* rules by which it rents its equipment from trunk line carriers. The trunk line carrier in this instance is refusing to permit the short line owning no equipment to rent equipment under those rules, prescribed by the Commission and approved by this court. If petitioner Missouri Pacific lines should abide by the car service rules and permit the Port Isabel line to obtain its equipment under those rules, that line is ready and willing to rent the equipment to perform the transportation service here involved. (R. 168.) The rules and regulations under which the equipment may be rented have been approved and the tariff containing the interchange rules under which the cars are interchanged as between carriers are on file with the Interstate Commerce Commission. (R. 147-148.)

It is not true, as stated on page 25 of petitioners' argument, that an administrative remedy exists by which complainants may obtain the necessary relief. See *C. S. Wells & Son v. Chicago, Burlington & Quincy*, 161

I. C. C. 145 and *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208, 37 S. Ct. 95. But, even so, the Act (Section 49, Title 49, Chapter 2, U. S. C. A.) specifically provides that:

> "The remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceding chapter."

Petitioners, on page 25, rely strongly upon the dissenting opinion of Circuit Judge Hutcheson. A review of that dissent will show that the concern of the learned judge with the measure of the revenue accruing to the various carriers has obscured the question as to the jurisdiction of the court. We point to the emphasis in the dissent on certain aspects of the case (R. 198):

(1) The Missouri Pacific has no interest in the movement except to perform a switching service.

(2) What is sought here is to compel the connecting carriers to furnish cars which may be needed in Mexico.

(3) There are no joint through rates.

(4) The traffic does not originate on the lines of the Missouri Pacific.

(5) The Missouri Pacific gets no line haul on the traffic.

These matters have no bearing on the jurisdiction of the lower court to enforce published tariffs. Elsewhere in the opinion the learned judge refers to the rates collected by the Missouri Pacific as "meager" and "small." (R. 194-195.) As a matter of fact, the proof on hearing will

show that the rates exacted are among the highest in the United States and particularly that they are the highest being exacted at any point along the Gulf coast. However that may be, the volume of the rate or the method of publication—whether they be called line-haul rates or switching rates—can have no effect upon the jurisdiction of the court to enforce those rates when they are once published and on file with the Commission.

The crucial error in the disenting judge's viewing of the case is the failure to observe the fact that the car service rules were on file with the Commission, that they had been prescribed by the Commission and approved by this Court, and that in the instance of the Port Brownsville the Missouri Pacific has refused to abide by these rules.

Apparently the learned judge overlooked the fact that the filing of the interchange rules with the Interstate Commerce Commission as required by Section 6 of the Act gives such rules the force of law in the same manner that the force of law attaches to the publication and filing of rates with the Interstate Commerce Commission. The dissenting opinion emphasizes that the car service rules of the American Railway Association are "purely voluntary" and that they do not have the force of law. The record shows (R. 148) that the car service rules are on file with the Interstate Commerce Commission; therefore they do have the same force of law as is accorded all publications filed with that commission.

At page 25 of the petition, it is stated:

> "There is something inherently wrong in a demand that an American railroad, operating an intermediate switching line and enjoying no substantial revenue from the transaction, should be required to furnish all of the equipment for the movement of international traffic when the Mexican railroads, the real beneficiaries of the movement, are unwilling to furnish any part of the rolling stock and when the court, which is called upon to enter the order must direct that American railroads, in order to comply with the demands, to send its property out of the jurisdiction of this and every other court of the United States, where it will be subjected to the specific needs of foreign jurisprudence."

That statement is erroneous in substance and in implication. We are not seeking an order from the court commanding these petitioners to send their equipment out of the jurisdiction of the United States of America. We ask only that they be required to transport at published rates. It is a fact, as shown by this record, that the American railways, including the Missouri Pacific line, freely send their cars into and out of the Republic of Mexico, in the handling of traffic to and from all other ports other than the Port of Brownsville. We call attention again to the incident of the steel billets, originally booked to move to the Port of Brownsville, which in fact did move into Mexico in American railway cars through the Port of Corpus Christi. We ask the attention of the Court to Missouri Pacific cars 13200, 71303, 72273 (R. 144), used by the Texas Mexican Railway to transport the steel billets from Corpus Christi to Laredo.

On those cars, the petitioner Missouri Pacific lines, received only the *per diem* as provided for in the car service rules under which all short-line railways operate. It refused to permit the same rules to operate for the purpose of moving traffic through the Port of Brownsville. Those cars, in the normal course of business, were made empty at Monterrey, Mexico, and loaded northbound with traffic coming back into America. (R. 144.) The port of Brownsville is denied an opportunity to participate in that return traffic by the act of the Missouri Pacific in refusing to transport those cars at published rates from the interchange with the National Railways of Mexico to the Port of Brownsville through the gateway of Brownsville. Vague generalities relating to inherent wrongness or rightness cannot avail as defensive argument in a suit to compel the performance by a common carrier of its duty under statute and tariff, but we are struck with the fact that, if there is any aspect of this case calling for the homily of moral judgment, it is the effort of the Missouri Pacific to strangle this port in its infancy. Certainly there is nothing "inherently wrong" in the demands of the Port of Brownsville that does not affect equally and alike the movement of all the traffic through these gateways to and from the Republic of Mexico.

The pleadings and the evidence offered show that this case comes within that line of authorities holding that preliminary resort to the Interstate Commerce Commission is not necessary. This court has recently reviewed the authorities in the case of *Brown Lumber Co.*

v. L. & N. Railway, 299 U. S. 393. Direct resort to the court was there upheld on the authority of the *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285. In addition to those two cases, we respectfully ask attention to the following decisions in which this Court has specifically sustained the jurisdiction of the court in matters where only the enforcement of tariff provisions was before the court. See *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188; *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867; *Illinois Central Railway Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 S. Ct. 760, 59 L. Ed. 1306; *Eastern Railway Co. of New Mexico v. Littlefield*, 237 U. S. 140, 35 S. Ct. 489, 59 L. Ed. 878.

CONCLUSION

In conclusion, we most respectfully submit that the lower court has reached a proper and correct conclusion based upon an accurate statement of the issues and the evidence and that the petition for the writ of *certiorari* should be denied.

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